In the Supreme Court of the United States

IN THE

OCTOBER TERM, 1933

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, Petitioner,

v.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL APPENDIX TO PETITIONER'S BRIEF

CHRONOLOGY OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION AFFECTING PETITIONER'S CLAIM AND OF ACTION THEREON

1.

February 9, 1922. Construction of the word "deficit," 66 I. C. C. 765, wherein the Interstate Commerce Commission construed the word "deficit" to mean the difference between the test period operations and the control period operations.

2.

After February 9, 1922 and before March 20, 1925 (record does not show date), petitioner filed its claim with the Interstate Commerce Commission.

3.

March 20, 1925. Deficit settlement with Butte, Anaconda & Pacific Railway, 94 I. C. C. 617, wherein the Interstate Commerce Commission allowed petitioner's claim in the sum of $487,116.31 in settlement of all claims against the Governmment under Section 204 and certified said amount to the Secretary of the Treasury.

4

March 26, 1925. The claim in the above amount was paid by the Treasurer of the United States to the petitioner.

5.

October 17, 1925. Deficit status of Bingham & Garfield Railway Co., 99 I. C. C. 724, wherein the Interstate Commerce Commission reversed itself on the meaning of the word "deficit" and held the word to mean a "red ink" figure.

6.

January 8, 1927, the Interstate Commerce Commission issued an order to the petitioner to show cause why the certificate theretofore issued it should not be cancelled and its claim dismmissed.

7.

March 7, 1927. Deficit settlement with Butte, Anaconda & Pacific Railway, 117 I. C. C. 780, wherein it was ordered that the certificate theretofore issued to the petitioner was cancelled and its claim dismissed.

8.

June 8, 1928. Repayment of the amount certified was demanded of petitioner by the Secretary of the Treasury and refused.

9.

August 23, 1929. The complaint herein was filed in the District Court of the United States for the District of Montana.

ORDER.

At a session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 8th day of January, A. D., 1927.

FINANCE DOCKET NO. 2602.

DEFICIT SETTLEMENT WITH THE BUTTE, ANACONDA & PACIFIC RY.

Whereas, The Commission, by Division 4, on the 20th day of March, 1925, issued a report in the above-entitled

proceeding and did certify to the Secretary of the Treasury of the United States that the amount payable to the said Butte, Anaconda & Pacific Railway Company under the provisions of paragraphs (f) and (g) of section 204 of the Transportation Act, 1920, was $487,116.31; and

Whereas, The record in said proceeding shows that said company received a net railway operating income for that portion (as a whole) of the Federal control period during which it operated its own railroad or system of transportation; and

Whereas, This Commission subsequently, to wit, on the 17th day of October, 1925, in Finance Docket No. 2500, *Deficit Status of Bingham & Garfield Railway Company*, 99 I. C. C., 724, decided, in effect, that the provisions of said section are not applicable to any carrier which received a net railway operating income for that portion (as a whole) of the Federal control period during which it operated its own railroad or system of transportation.

It is ordered, That the said proceeding in Finance Docket No. 2602 be, and it is hereby, reopened for hearing before Assistant Director C. V. Burnside, at Washington, D. C., on the 28th day of January, 1927, at 10 o'clock A. M., for the purpose of affording the said Butte, Anaconda & Pacific Railway Company opportunity to show cause why the certificate issued in said proceeding on the 20th day of March, 1925, should not be revoked and the claim in said proceeding dismissed.

It is further ordered, That this order be served upon said Butte, Anaconda & Pacific Railway Company and that a copy thereof be sent by mail to the Secretary of the Treasury of the United States.

By the Commission, Division 4.

(SEAL) GEORGE B. McGINTY,
Secretary.

FINANCE DOCKET NO. 2602.
DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY.

Submitted March 1, 1927. Decided March 7, 1927.

On further hearing and reconsideration, and following *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C., 724, the provisions of section 204 of the transportation act, 1920, held not to be applicable to the Butte, Anaconda & Pacific Railway Company. Original report, 94 I. C. C., 617. Certificate issued March 20, 1925 cancelled, and claim dismissed.

Ben B. Cain, L. O. Evans and Warren Nichols for Butte, Anaconda & Pacific Railway Company.

Ben B. Cain for American Short Line Railroad Association.

REPORT OF THE COMMISSION ON FURTHER HEARING AND RECONSIDERATION

DIVISION 4, COMMISSIONERS MEYERS, EASTMAN, AND WOODLOCK. BY DIVISION 4:

In the original report in this proceeding, issued March 20, 1925, we found that the amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, was $487,116.31, and a certificate to that effect was issued to the Secretary of the Treasury. The claim of the carrier, filed with us, indicated that it received in the period from July, 1918, to February, 1920, inclusive, a net railway operating income of $256,855.19. Our examination of the carrier's accounts has shown that the correct amount of net railway operating income received in that portion of the Federal control period during which the carrier operated

its own railroad was $239,525.13. Our report recited that the settlement proposed was based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, *Construction of the Word "Deficit,"* 66 I. C. C., 765. In the report thus cited the commission held that the word "deficit" as used in paragraph (a) of section 204 meant a decrease in net railway operating income in the Federal control period as compared with the corresponding months of the test period. Subsequently, however, and since the issuance of the original report and certificate in this proceeding, we have held, in substance, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C., 724, that the words "Deficit in its railway operating income," as used in paragraph (a) of section 204, should be construed to mean an excess of charges over credits to railway operating income for the period under consideration.

Pursuant to the latter construction of the law, we issued an order on January 8, 1927, reopening the proceeding and setting a hearing for the purpose of affording the Butte, Anaconda & Pacific Railway Company opportunity to show cause why the certificate issued on March 20, 1925, should not be revoked and its claim dismissed. Such hearing was held on March 1, 1927, at which the carrier was represented by counsel, who filed a special appearance merely for the purpose of filing a protest, the essential portion of which is as follows:

> Said Butte, Anaconda & Pacific Railway hereby objects to and protests against the action of the Interstate Commerce Commission in entering its order of January 8, A. D. 1927, and/or in entering or attempting to enter any other or further orders whatsoever, and/or in taking or attempting to take any other or further action whatsoever in said above entitled Finance Docket No. 2602, for the reasons that said Interstate Commerce Commission was and is wholly without right, power and/or authority to

enter said order of January 8, A. D. 1927, and to enter or to attempt to enter any other or further order, or to take or to attempt to take any other or further action whatsoever in said above-entitled Finance Docket No. 2602.

The President of the American Short Line Railroad Association, who appeared as counsel for the carrier, also requested leave to file as *amicus curiae* copies of an argument presented by him in behalf of the American Short Line Railroad Association on November 4, 1921, in Finance Docket No. 1600, requesting its consideration in view of the bearing of the present proceeding upon the settlements heretofore made under section 204 with a large number of other carriers. Such argument has been fully considered by us.

Upon further hearing, reconsideration of the record, and following our conclusion in *Deficit Status of Bingham & Garfield Ry. Co., supra,* we find that the provisions of section 204 of the transportation act, 1920, are not applicable to the Butte, Anaconda & Pacific Railway Company. An order will therefore be issued canceling our certificate of March 20, 1925, and dismissing the claim of that company.

ORDER.

Entered March 7, 1927.

Further hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report on such further hearing and investigation, containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the certificate issued in said proceeding on March 20, 1925, be, and it is hereby, revoked and cancelled.

It is further ordered, That the claim of the said Butte, Anaconda & Pacific Railway Company in said proceeding be, and it is hereby dismissed.

And it is further ordered, That this order be served upon said Butte, Anaconda & Pacific Railway Company, and that a certified copy thereof be sent by mail to the Secretary of the Treasury of the United States.

117 I. C. C., 780.